an organization with such nonproducer interests to avail itself of the Capper-Volstead exemption.[15]

The judgment below is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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contracted. For example, Sunkist has the power to review contracts between growers and the agency associations. Obviously, to the extent that the agency associations are represented in the councils of Sunkist, they in effect review their own contracts.

[15] All we decide is that Sunkist Growers, Inc., is not entitled to assert Capper-Volstead as a defense to the suit based on § 1 of the Sherman Act. We express no views on the merits of that suit.

SUPREME COURT OF THE UNITED STATES

No. 66.—October Term, 1967.

Case-Swayne Company, Inc., Petitioner, *v.* Sunkist Growers, Inc. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[December 18, 1967.]

Mr. Justice White, with whom Mr. Justice Stewart joins, concurring in the result.

I agree with the Court's basic judgment that Congress intended to grant immunity from the antitrust laws only to the cooperative efforts of "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers . . . ." Arrangements between growers and nongrowers are subject to scrutiny under the antitrust laws. Under the controlling decisions any combination between Sunkist and nongrower packing houses, were they not members of Sunkist, would have to meet the standards of the antitrust statutes. *United States* v. *Borden Co.*, 308 U. S. 188 (1939). Making the nongrower a member of the cooperative should not and does not immunize grower-nongrower transactions from any of the antitrust laws. Despite such membership, these transactions continue to be forbidden if they violate § 1. Indeed, membership should itself be looked upon as an agreement or combination between growers and nongrowers which, if it restrains trade, is subject to suit under the Sherman Act. Hence, since the complaint in this case encompassed a charge that certain arrangements between Sunkist and the nongrower agency associations denied product fruit to Case-Swayne and violated the antitrust laws, I agree that it was error to dismiss the § 1 charge on immunity grounds.

But it does not follow that Sunkist has lost its antitrust immunity completely. The bulk of its members are grower cooperatives or marketing agencies, and the great majority of its transactions are dealings with and for the account of these agricultural cooperatives which Congress clearly intended to exempt from the antitrust laws. An exempt organization may not conspire with an outsider to violate § 1, but if it does, it does not forfeit its immunity except for that transaction. I see no reason for a different consequence where the conspiracy or combination takes the form of granting membership in the exempt organization. If nongrower membership is a combination in restraint of trade or if any agreements between Sunkist and the nongrower member violate the Sherman Act, Case-Swayne should be able to collect treble damages for any injury flowing from such violations. But I see little basis for concluding that the membership of the agency association strips Sunkist of its status as an exempt cooperative and exposes it to what would be very extensive liability under the antitrust laws wholly unrelated to the nongrower affiliation.

At the base of the Sunkist organization are 12,000 growers who themselves are not members of Sunkist but who are members of local associations which operate packing houses and which pick, pack, and arrange for the marketing of the fruit grown by their members. Most of these local associations appear to qualify as exempt agricultural cooperatives. A relatively small number, however, the so-called agency associations, are privately owned packing houses which buy and pack the fruit of those growers with whom they contract. The local associations, including the agency associations, are in turn organized into district exchanges which, unless agency association membership disqualifies some of them, would seem also to be exempt cooperatives. The district

exchanges are primarily marketing organizations. Sunkist, a member corporation, is at the top of the pyramid. Among other things, it has ultimate authority and responsibility for the marketing of both fresh and product fruit.

Membership in Sunkist is made up of the local associations and the district exchanges. The agency associations make up about 15% of the membership. They have, however, no direct voice in the election of Sunkist directors since the selection of directors is vested in the exchange members alone. The directors have very wide authority to conduct the affairs of Sunkist. Under the charter and bylaws, general membership carries with it little power and influence. Membership does, however, involve the execution of a membership application and agreement binding the member to Sunkist's charter and bylaws, which give Sunkist extensive powers over the marketing of its members' fruit, including the power to confine the packing, processing, and marketing functions to the Sunkist family. In addition, local associations and exchanges apparently execute the standard "Sunkist-District Exchange-Association Agreement" which, among other things, contains the agreement by the local association to market fruit exclusively through the exchanges and by the exchange to market exclusively through Sunkist.

If Sunkist's exemption is completely lost because of the membership of the nongrower agency associations, several consequences follow. Those district exchanges which have nongrower members will likewise forfeit their exemption. The arrangements among Sunkist, exempt exchanges, and exempt local associations will be looked upon as arrangements between exempt and nonexempt organizations. Thus for all practical purposes the entire Sunkist structure will be exposed to antitrust liability for a great many transactions which are wholly between growers or between their cooperative organizations, trans-

actions which Congress intended to exempt from the antitrust laws.

Neither the agency associations themselves nor their arrangements with growers are claimed by Sunkist to be Capper-Volstead cooperatives exempt because of that status from examination under the Sherman Act. Also, the contracts and arrangements between the agency associations, nonexempt entities, and the exchanges and Sunkist, which should be treated as otherwise exempt entities, are themselves within the reach of § 1. Among these nonexempt arrangements is the membership of an agency association in either an exchange or Sunkist itself. Case-Swayne should be able to recover from Sunkist those damages which flow from restraints of trade resulting from the agreements between the agency associations and Sunkist or between the agency associations and the district exchanges and from the membership of the agencies in either Sunkist or the exchanges. But Case-Swayne should not recover for injury to its business caused by other intercooperative or intergrower transactions and not resulting from the forbidden relationship between an exempt and a nonexempt entity. This result, in my view, will more nearly serve the policy of Congress in granting antitrust exemption to growers and their cooperative activities.

I would remand to the District Court for a trial of the § 1 case under the above principles.

SUPREME COURT OF THE UNITED STATES

No. 66.—October Term, 1967.

Case-Swayne Company, Inc., Petitioner, *v.* Sunkist Growers, Inc. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[December 18, 1967.]

Mr. Justice Harlan, concurring in part and dissenting in part.

I agree with the Court's holding that Congress did not intend that nonstock organizations with nonproducer members should qualify for the antitrust exemption conferred by § 1 of the Capper-Volstead Act, 7 U. S. C. § 291, and that the Sunkist system therefore is technically not a properly constituted Capper-Volstead cooperative. However, like my Brother White, I am unable to ignore the possible effect of the Court's holding insofar as it subjects this large agricultural organization to antitrust liability extending far beyond the confines of this suit.

There is nothing in the record to indicate that Sunkist intended to evade the mandate of the Capper-Volstead Act when it allowed privately owned "agency association" packing houses to become members of the Sunkist system. Sunkist's only apparent motive in including the agency associations as members was to provide a greater range of packing facilities for citrus growers who desired to market through Sunkist. The agency associations have been an integral part of the Sunkist system for many years.[1] Until the bringing of the present action,

[1] It appears that the agency associations have been members of the system at least since 1924. See McKay & Stevens, Organization and Development of a Cooperative Citrus-Fruit Marketing Agency 22–23 (U. S. Dept. of Agriculture, Bull. No. 1237, 1924).

this aspect of Sunkist's organization had apparently gone without challenge from private persons who dealt with Sunkist. Its legality never seems to have been questioned by any agency of government. Sunkist argued before us, without challenge to its sincerity, that the membership of the agency associations did not deprive it of antitrust immunity so long as all of its actions were taken for the benefit of the growers. There is no reason to doubt that this has been Sunkist's belief through the years.

In these circumstances, it seems inequitable that the membership of the agency associations should cause Sunkist to lose all of its previously assumed immunity from liability under § 1 of the Sherman Act. This would evidently be the consequence of the Court's holding, and if not mitigated in any way it would appear to expose Sunkist to very large liabilities. Many of the activities of a marketing organization the size of Sunkist presumably amount to restraints of trade, and under the Court's rationale Sunkist would be subject to treble damage suits in respect of all of them. The chief result would be to allow windfall treble damage recoveries to persons with whom Sunkist dealt at arm's length and in good faith. The main burden would ultimately fall on the growers at the base of the Sunkist organization.

I would hold that Sunkist is not liable under § 1 of the Sherman Act for past acts merely because the agency associations participated in its government by virtue of their membership. It seems to me that this result is not only more equitable but accords better with the basic purpose of Congress, which was to aid producers, than does the Court's holding, which burdens the growers with heavy potential liabilities. This belief is supported by the frequent reference in the congressional debates to the forerunner of this very organization as

one which Congress intended by the Act to protect.[2] Sufficient precedent for this type of equitable mitigation is found in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 370 U. S. 19, in which this Court held that Sunkist's former "tripartite" structure did not deprive it of its § 1 immunity. The Court there stated that

> "To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect to these growers who have banded together for processing and marketing purposes within the purview of the Clayton and Capper-Volstead Acts." *Id.*, at 29.

The very words of Capper-Volstead § 1, however, make it clear that Congress granted antitrust immunity to agricultural cooperatives only on condition that all of the benefits of cooperative organization were received by agricultural producers. Therefore, I would also hold that Sunkist may not assert antitrust immunity if the damage complained of resulted from attempts by the agency associations to use their power within Sunkist for their own benefit as distinguished from that of the growers.

The Court holds, and, as respects the future, I agree, that even those organizations in which all gains are channeled to the producers may not qualify under Capper-Volstead § 1 if they have nonproducer members. Congress may have excluded nonproducers simply because it felt that the benefits to producers from nonproducer membership were outweighed by the dangers of admitting nonproducer foxes into the cooperative hen roost. However, as the Court recognizes, see p. —, *ante*, the evident congressional concern about the possibility of monopoly by organizations immunized from

[2] See p. —, n. 12, *ante*.

antitrust prosecution by Capper-Volstead[3] indicates that in restricting membership to producers Congress also intended to limit in a rough way the amount of market power which could be controlled by such organizations. The resources of nonproducers were to be available to the cooperatives not through the broad avenue of membership but by the narrower path of contract: the Act provides that qualifying organizations and their members "may make the necessary contracts and agreements" to effect the Act's purposes. To give effect to this legislative intent, I would hold that the marketing agreements of the agency associations with Sunkist and with individual growers must be tested by the standard applicable to contracts with nonmembers.

The Court of Appeals held that, treated as contracts with nonmembers, the agreements in question were proper under the Act. 369 F. 2d 449, 461–462. I agree. Regarded as contracts, these agreements provide essentially that a grower who desires to market through the Sunkist system and have his fruit packed by an agency association shall deliver to such association his entire crop for the year, that the agency association shall pack it in return for cost plus a fixed fee, and that the entire crop shall then be marketed by Sunkist. The contract may be canceled by the grower in August of any year. Since the main effect of these agreements is simply to give the growers who want to market through Sunkist a wider choice of packing facilities than they would enjoy if limited to cooperative packing houses, I would hold that the agreements are permissible when looked upon as contracts with nonmembers.

In accord with this opinion, I would remand the case to the District Court so that Case-Swayne may show what, if any, of the damage allegedly suffered by it re-

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[3] See, *e. g.*, 62 Cong. Rec. 2217–2226, 2257–2280.

sulted from actions taken by the agency associations for their own benefit as distinguished from that of the growers. I need hardly say that for the future Sunkist would forfeit its entire Capper-Volstead antitrust exemption were it to elect to continue the membership of the agency associations.

SUPREME COURT OF THE UNITED STATES

No. 66.—October Term, 1967.

Case-Swayne Company, Inc., Petitioner, *v.* Sunkist Growers, Inc. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[December 18, 1967.]

Mr. Justice Douglas, dubitante.

I am not as certain as Mr. Justice White appears to be that the immunity of the growers or cooperatives granted by the Capper-Volstead Act is only partially lost in case nongrowers combine with the growers or cooperatives. But the question is certainly not free of doubt and it has not been argued. Nor have the questions discussed by Mr. Justice Harlan been fully presented and argued. So far as we can tell at this stage of the litigation, all of those problems may turn out to be wholly abstract. The extent, let alone the nature, of participation by nongrower elements in the agreements and practices alleged to violate the antitrust laws has indeed hardly been explored. Therefore I think it is the part of wisdom specifically to reserve the questions with regard to the scope of the immunity that may survive today's ruling.